No. 85-521

In The

Supreme Court of the United States

October Term, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Appellants,

v.

PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT, ET AL.,

Appellees.

UNITED STATES OF AMERICA, ET AL.,

Appellants,

v.

STATE OF CALIFORNIA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

MOTION TO DISMISS OR AFFIRM

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PARTIES PLAINTIFF

The list of parties plaintiff in Appellants' Jurisdictional Statement is incomplete. Accordingly, a complete list is hereby submitted as follows:

Public Agencies Opposed to Social Security Entrapment (POSSE)

General Law Cities:

- Alturas
- Arcata
- Lincoln
- San Clemente
- San Anselmo

Charter City:

- Redondo Beach

Special Districts:

- Aromas Tri-County Fire Protection District
- Bear Mountain Recreation and Park District
- Big Bear Municipal Water District
- Delano Mosquito Abatement District
- Humboldt Community Services District
- Marin Municipal Water District
- North Bakersfield Recreation and Park District
- Paradise Irrigation District
- Paradise Recreation and Park District
- Pico Water District
- Placentia Library District
- Rancho Simi Recreation and Park District
- Salispuedes Fire Protection District
- Yorba Linda Library District

Individual Plaintiffs:

- Katherine T. Citizen
- Margie Hunt
- William Rasmussen

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Appellees, Public Agencies Opposed to Social Security Entrapment et al., (POSSE) pursuant to rule 16 of the Rules of the Supreme Court of the United States, hereby

move this Court to dismiss this appeal or to affirm the decision of the United States District Court for the Eastern District of California for the following reason:

This case does not present a substantial federal question.

———o———

INTRODUCTORY STATEMENT

Appellants appeal the decision of the United States District Court for the Eastern District of California, which ruled that Act of Congress (Pub.L. 98-21) section 103(a) and (b) is void and the State of California and its political subdivisions have the lawful right to withdraw from the Old Age, Survivors and Disability Insurance Benefits program of the Social Security Act ("Program") as long as they have met the requirements of the Agreement between the United States and the State of California and the law. It should also be noted that in its Statement of Parties To The Proceedings, Appellants have set forth an incomplete list of the parties. An accurate catalog of the parties appears in the District Court's Opinion. (See Jurisdictional Statement ["J.S."] Appendix A pages 7a through 9a).

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SUMMARY OF ARGUMENTS

Appellees will demonstrate that there is no substance to the arguments raised by Appellants in their J.S. Those arguments are that agreements executed pursuant to 42 United States Code section 418 are not true contracts and,

thus, are subject to congressional modifications at will; or, in the alternative, if they are true contracts, they are nevertheless subject to congressional modification to which courts can give only minimal scrutiny.

Throughout their J.S. they make the further spurious argument that by enforcing the Federal-State Agreement the District Court is foreclosing Congress from amending the *Statute* as distinguished from the *Agreement*. The District Court's opinion cogently refutes all of the issues raised by Appellants, including the latter one.

———o———

STATEMENT REGARDING THE FACTS

Although the Social Security Act (42 U.S.C., 301 et seq.) exempted state and local governments from mandatory participation in the program, in 1950 the Act was amended to permit the United States Secretary of Health and Human Services to enter into agreements with the States whereby the latter could enroll their employees and those of their political subdivisions in the program.

Effective January 1, 1951, the United States entered into such an Agreement ("Agreement") with the State of California ("State"). This Agreement was executed pursuant to 42 United States Code section 418(a) (1) under which the Old Age, Survivors and Disability Insurance Benefits program of the Social Security Act (the "Program") would be extended to public employees if and when the State and its eligible public agencies chose to include them.

As originally enacted and in effect on January 1, 1951, the Agreement permitted the State to withdraw any coverage group, that is, eligible employees of the Appellee public agencies, upon two years' advance notice to the Secretary. (42 U.S.C., 418(g).)

To implement its Agreement, the State enacted enabling legislation (Government Code Sec. 22000-03) pursuant to which Agreement and legislation, the State entered into individual agreements with those public agencies wishing to participate in the Program. The public agencies became enrolled in the Program when the State and the United States modified the state/federal Agreement to include them as a part thereof. (42 U.S.C., 418(c)(4).) The public agencies were required by the State's enabling legislation to make certain "contributions" to the State as payment for their participation. (Government Code Sec. 22551-53.) As permitted by that legislation, the public agencies could withdraw from coverage (and concomitant liability to the State), upon two years' advance notice to the State. (Government Code Sec. 22310.)

Then, in April 1983, Congress enacted Public Law No. 98-21, section 103(a) and (b), amending 42 United States Code section 418(g), to provide that "[n]o agreement under this section may be terminated, either in its entirety or with respect to any coverage group, on or after April 20, 1983." In other words, this amendment prevented any state from withdrawing coverage for any of its employees, or those of its political subdivisions, even if a termination notice had been filed and was pending at the time Public Law No. 98-21, section 103(a) and (b) was enacted.

Through April 1983, the State, which had a section 418 Agreement with the Secretary since 1951, had filed termi-

nation notices on behalf of approximately 200 of its political subdivisions. However, Public Law No. 98-21 prevented the termination from taking place in due course.

The POSSE Appellees then filed suit against the United States and the State of California to challenge the amended section 418(g), which prohibited the State and/or its subdivisions from withdrawing from the Program. Subsequently the State of California also sued the United States.

The District Court decided that the Agreements were contracts and thus properly within the meaning of the Fifth Amendment's Takings Clause. The District Court also found that the right to withdraw was a contractual right and went on to conclude, therefore, that Congress could not deprive the State and its political subdivisions of the right without just compensation. However, the District Court said it could not order "just compensation" in the usual sense because of the unique circumstances. Instead, the Court declared that amended section 418(g) is void and that the State of California and its political subdivisions have the lawful right to withdraw from the Program.

———o———

ARGUMENT

I

INTRODUCTION

In its opinion, the District Court held that apart from the statute, Appellees have a contractual right to withdraw from the Program. It held that even if it be assumed *arguendo* that Congress may by statute terminate a *statu-*

tory right to withdraw, it may not abrogate or repudiate its own agreements entered into pursuant to statutory authorization.

Because this proposition is so clear, simple and undeniable, Appellants have advanced an array of conclusions rather than legal authority to support their thesis that the Agreement is not a contract. (J.S. 10-16.) They also have proffered additional conclusions that even if the Agreement is a contract, they are not bound by its terms because Congress amended section 418(g) for the public good. (J.S. 16-19.)

Moreover, because of their tenuous position, Appellants have referred to three different sets of relationships, and erroneously have used them as though they were virtually interchangeable. Yet each of these relationships has a different legal effect. And this Court consistently has drawn clear distinctions among them. It therefore is vital to recognize their distinct nature and to keep them in their proper context. These relationships are as follows:

1. Express contracts (agreements) to which the Federal Government is by the terms of the contract one of the parties to the contract. It is this type of relationship which is not only at issue in this case but also which this Court consistently has held binds the Federal Government. Accordingly, any decisions of this Court which do not deal with this type of relationship simply are inappropriate.

2. Legislative acts which may or may not confer contractual status upon parties depending upon the statutory language involved. The instant case is not such a case.

3. Contracts between a governmental entity other than the Federal Government and private parties, or strictly between private parties. Again, the instant case is not such a case.

Appellants' Jurisdictional Statement and the District Court's Opinion must be read with these distinctions clearly in focus.

II

THE DISTRICT COURT PROPERLY HELD THAT APPELLANTS HAVE A CONTRACTUAL RELATIONSHIP WITH APPELLEES.

As the District Court noted, the Agreement executed between Appellants and Appellees evidences an agreement between the parties that each promises to do certain things and to assume certain obligations. "Under any definition of contract, this is a contract. See, *e.g., Wood vs. United States,* 724 F. 2d 1444, 1449 (9th Cir. 1984) (citing *Pennhurst State School & Hospital vs. Holderman,* 451 U.S. 1, 17 (1981))." (*Pub. Agencies Opp. To Soc. Sec. Entrapment vs. Heckler,* 613 F. Supp. 558, 573 (D.C. Cal. 1985).)

Because of the elementary nature of this legal concept, Appellants have relied on their conclusionary statement that "Section 418 [agreements] thus constitutes a social welfare program essentially universal in its application, rather than 'a contractual arrangement.' *National Railroad Corp. vs. Atchison, T. & S.F. Ry. . . . .*" (J.S. 10-11.) Appellants continue with further reliance upon *National Railroad* for other generalized conclusions. Unfortunately for Appellants, however, the Court pointed out that there is a definite distinction between contracts to which the United States is and is not a party.

> "Because, as we have demonstrated, neither the Act nor the Basic Agreements created a contract between railroads and the United States, our focus shifts from a case in which we confront an alleged impairment, by the government, of its own contractual obligations, to one in which we face an alleged legislative impairment of a private contractual right. We therefore have no need to consider whether an allegation of a governmental breach of its own contract warrants application of the more rigorous standard of review that the railroads urge us to apply. Instead, we turn to consider whether the payment obligation in 405(f) of the Act unconstitutionally impairs the private contractual rights of the railroads." (*Wood vs. United States,* 724 F. 2d 1444, 1454-1455 (9th Cir. 1984).)

Appellants then urge not only that pursuant to 42 United States Code section 1304, Congress has repealed the termination right but also that contractual arrangements remain subject to subsequent legislation. As far as the former is concerned, there is no doubt that Congress can, within constitutional limits, repeal or modify the Statute. But as the District Court noted:

> "Even if Congress' power to amend the statute is incorporated into the contract, such incorporation does not address the question of whether, when Congress exercises that power, it may deprive the State of its existing contractual rights without compensation. By virtue of the Fifth Amendment, Congress is simply not free to deprive the State of its contractual right without just compensation." (*Pub. Agencies Opp. To Soc. Sec. Entrapment vs. Heckler, supra,* 613 F. Supp. at 574.)

The decisions upon which Appellants rely hardly support their second contention. Aside from *National Railroad Passenger Corp. vs. Atchison T. & S.F. Ry.,* — U.S. —, 105 S. Ct. 1441 (1985), Appellants refer to *Merrion vs.*

Jicarillo Apache Tribe, 455 U.S. 130 (1982), which is totally irrelevant. In *Merrion,* this Court held that the failure to mention severance taxes in the oil leases on tribal lands did not prohibit the Indians from imposing the tax because the Indians always had the sovereign power to tax. But the fact that the sovereign retained the power to tax irrespective of the contract has no bearing upon the rights and obligations that are set forth in the instant parties' Agreement.

Appellants then seize upon a statement from *Flemming vs. Nestor,* 363 U.S. 603 (1960), in support of their position without first pointing out the salient fact that in *Flemming* this Court was determining the rights of an ordinary non-governmental employee covered by the Social Security Act. Interestingly enough, the Court also said that Congress may not modify the statutory scheme of the program "free of all constitutional restraint." (*Id.* at 611.)

Next, Appellants rely on certain language from *United States Trust Co. vs. New Jersey,* 431 U.S. 1 (1976) to fortify their sovereign power contentions. But it does not assist them for this Court made clear that,

> ". . . a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives. Similarly a State is not free to impose a drastic impairment when an ardent and more moderate course would serve its purposes equally well." (*Id.,* at 30-31.)

So this Court said in adopting a two-pronged test of reasonable and necessary: necessary to achieve the plan and reasonable in light of the circumstances. (*Id.,* at 29.) Here, Appellants presented no evidence whatsoever before the District Court to show that they met the test set out

in *United States Trust.* Further, at issue in *United States Trust* was a "statutory covenant" between two states. There was no Agreement to which the United States was a party. Consequently, the holding of that case is not relevant to the instant case.

Finally, Appellants egregiously misparaphrase language from *National Railroad* with their statement that "when a contract is impaired by federal legislation, 'the judicial scrutiny [is] quite minimal.' (*National Railroad Passenger Corp.,* slip op. 21.)" (J.S. 16.) The truth of the matter is that this Court said: *"When the contract is a private one, and when the impairing statute is a federal one,* this next inquiry is especially limited, and the judicial scrutiny quite minimal." (*Id.,* 105 S. Ct. at 1455.)

Appellants add further confusion with their statement "to make out a constitutional violation, the complaining party must demonstrate '"that the legislature has acted in an arbitrary and irrational way."' (Various citations.)" (J.S. 16-17.) Appellants omitted to state that this principle applies to situations or contracts solely involving private parties. For example, see *Pension Benefit Guaranty Corp. vs. Gray & Co.,* — U.S. —, 81 L. Ed. 2d 601, 610-611 (1984).

Most importantly, this Court has observed on previous occasions that "impairments of a State's own contracts would face more stringent examination under the Contract Clause than would laws regulating contractual relationships between private parties. . . ." (*Allied Structural Steel Co. vs. Spannaus,* 438 U.S. 234, 244, fn. 15 (1977).)

Thus, when analyzing the issues raised herein, it must be borne in mind that here *we are here dealing with a*

contractual Agreement between the United States and the Appellees, a circumstance which is governed by tests which are different from those discussed at length by Appellants in their Jurisdictional Statement. It follows that the cases cited by Appellants are inapposite to the instant case. Their failure to make this vital distinction is fatal to Appellants' challenge to the District Court's Opinion.

III

THE DISTRICT COURT PROPERLY FOUND THAT THE APPELLANTS ARE BOUND BY THEIR CONTRACTUAL OBLIGATIONS

The principle is well established that the United States and its duly appointed agents are bound by their contractual obligations. Years ago in *Perry vs. United States,* 294 U.S. 330, 350 (1935), this Court said:

> "On that reasoning, if the terms of the Government's bond as to the standard of payment can be repudiated, it inevitably follows that the obligation as to the amount to be paid may also be repudiated. The contention necessarily imports that the Congress can disregard the obligations of the Government at its discretion and that, when the government borrows money, the credit of the United States is an illusory pledge.
>
> "We do not so read the Constitution. . . . To say that the Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise, *a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our Government. . . .*" (Emphasis added.)

Perry recognized the principle that:

> "When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties

to such instruments. • • • " (See *Perry, supra* at 352.)

This Court in *Perry* further noted that in *Lynch vs. United States,* 292 U.S. 571, 580 (1934), which centered around the severe economics of the depression, this Court had said:

> "No doubt there was in March, 1933, great need of economy . . . But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. *To abrogate contracts, in the attempt to lessen Government expenditure, would be not the practice of economy, but an act of reputation. . . .*" (Emphasis added.)

This principle was again recognized by this Court in *National Railroad Corp. vs. Atchison, T. & S.F. Ry. Co., supra,* — U.S. —, 105 S. Ct. 1455, fn. 24:

> "There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements. . . . To say that the Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our Government. *Perry vs. United States,* 294 U.S. 330, 350-351, 55 S. Ct. 432, 434-435, 79 L. Ed. 912 (1935)."

In spite of this long standing state of the law, Appellants seek to circumvent their obstacle by claiming that 42 United States Code section 1304 gives Congress the right to change contracts as well as statutes. This Court described a similar contention as being absurd: "A promise to pay, with

a reserved right to deny or change the effect of the promise, is an absurdity." (*Murray v. Charleston,* 96 U.S. 432, 445, cited with approval in *United States Trust Co. vs. New Jersey, supra,* 431 U.S. 1, 24.)

Appellants' last defense is based on the "general welfare" or "for the good of the people" argument. This, too, is as untenable as their other contentions. As trying as the economic climate has been in recent years, it pales in comparison with the utter despair of the 1930's. Yet, this Court in *Perry vs. United States, supra,* 294 U.S. 330, did not find those truly extreme economic conditions as justification for repudiating or even substantially altering the contractual obligations of the United States.

To argue, as do appellants, that the change of a key provision in a contract without which Appellees would not have entered into the Program's domain is not a repudiation is to argue that nothing in a contract really matters unless the United States so wants it. Of course, that is total nonsense. Where substantial prejudice occurs, as it does here with the elimination of the withdrawal provision, the unilateral change sought by the Congress obviously results in a repudiation of the contract. Nothing could be clearer in this regard than this Court's statement that, "To abrogate contracts, in the attempt to lessen government expenditures, would be not the practice of economy, but an act of *repudiation.*" (*Perry vs. United States, supra,* 294 U.S. at 352-353; emphasis added.)

IV

THE DISTRICT COURT PROPERLY FOUND THAT CONTRACTS WITH THE UNITED STATES ARE VESTED PROPERTY RIGHTS AND THEIR TAKING WITHOUT DUE PROCESS OF LAW AND/OR JUST COMPENSATION VIOLATES THE FIFTH AMENDMENT.

The District Court correctly found that there was a "taking" without just compensation in this case. As this Court said in *Lynch vs. United States, supra,* 292 U.S. at 576-577:

> "The Fifth Amendment commands that property be not taken without making just compensation. *Valid contracts are property,* whether the obligor be private individual, a municipality, a state, or the United States. *Rights against the United States arising out of contract with it are protected by the Fifth Amendment.*" (Emphasis added.)

The Appellants, however, blandly conclude that the District Court "misapplies the law of takings" (J.S. 9) without demonstrating how the Court misapplied the law. Appellants have not cited a single decision to support their statement. Instead, they refer to cases which deal with retroactive application of a congressional act, contracts with private parties, or other totally disparate situations. None of Appellants' cited cases involved an express contract to which the United States Government was a party, as is the case here. This fact alone makes the District Court's conclusion that there had been a "taking" even more compelling than *Lynch* or *Perry,* and for that matter *United States Trust.*

V

THE DISTRICT COURT CORRECTLY FOUND THAT POSSE PLAINTIFFS PROPERLY WERE BEFORE THE COURT.

The District Court held that POSSE plaintiffs have standing "at least as third-party beneficiaries of the contract, if not actual contracting parties." *Public Agencies Opposed to Social Security Entrapment, et al. vs. Heckler, et al.,* 613 F. Supp. 558 at 570 (D.C. Cal. 1985). Appellants have not challenged that holding. Instead they argue that 42 United States Code section 405(g) is the only mechanism by which POSSE plaintiffs could challenge the Act. Even a cursory reading of Section 405 reveals that that section has no relevance to the instant case.

That section governs "evidence and procedure for *establishment of benefits.*" (Emphasis supplied.) The procedure is limited to the determination of *entitlement to benefits.* It has no relation to constitutional challenges to the statute itself.

To argue that in order to challenge the constitutionality of a statutory provision one first must claim a benefit is an absurdity.

In *Mathews vs. Eldridge,* 424 U.S. 319, 330 (1976), this Court said:

> "But cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate. This is such a case.
>
> "*Eldridge's constitutional challenge is entirely collateral to his substantive claim of entitlement. . . .*" (Emphasis added.)

In the case at bar, POSSE Plaintiffs made no claim of entitlement to benefits. They challenged the statute on grounds entirely unrelated to any questions of entitlement. It follows that there is no need to exhaust administrative remedies and that 42 United States Code section 405(g) is inapplicable. In fact, the instant case is more compelling than *Eldridge*. Rather than being merely "collateral" as in *Eldridge*, POSSE's constitutional challenge stands independently and alone.

VI

THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

Appellees have demonstrated that the conclusions of the District Court are consistent with and dictated by the decisions of this Court.

1. There is a contractual relationship between the United States and Appellees.
2. Congress is not free to repudiate that Agreement.
3. The repudiation constitutes a "taking."
4. The Statute is therefore void.
5. The District Court has not impaired the ability of Congress, within constitutional limits, to amend the Statute as distinguished from the Agreement.

The foregoing makes irrelevant Appellants' claim that the financial impact of the decision is "immense." But even were it relevant, the claim is inconsistent with their assertion that Congress could force everyone into the Program simply by enacting new legislation. (J.S. 15.) By that argument, the power to change the Program and thereby control any financial impact squarely would be within the Congress' hands.

CONCLUSION

For the reasons set forth above, Appellees respectfully submit that this Court should dismiss the appeal or, in the alternative, affirm the decision of the District Court.

DATED: November 11, 1985

Respectfully submitted,

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